

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was hand delivered to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road, Rm 123
Fairfax, VA 22030

and the original was delivered for filing to:

Hon. John T. Frey
Clerk of Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, VA 22030

and a true copy was delivered to the:

Hon. Jane Marum Roush
Judge, Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, VA 22030

this 29 day of ~~April~~, 2003.

August

Co-Counsel 

Co-Counsel

Filed in the Clerk's Office
the 29 day of August, 2003
TESTE: LILLIE M. HART, CLERK 4:00pm
By [Signature] D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,

v.

CR 03-3089

CR 03-3090

CR 03-3091

Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant.

**MOTION FOR BILL OF PARTICULARS AS TO THE CHARGE OF
CAPITAL MURDER UNDER VIRGINIA CODE § 18.2-31(13)**

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and moves this Court pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article One, Sections 8 and 11 of the Virginia Constitution, and Virginia Code Sections 19.2-230 and 19.2-266.2 to order the Commonwealth to file a bill of particulars as to the charge returned by the Grand Jury that Lee Boyd Malvo "did willfully, deliberately and with premeditation kill and murder Linda Franklin in the commission of an act of terrorism as defined in §18.2-46.4 of the Code of Virginia. Va. Code §18.2-31(13). In support of this motion counsel states as follows:

1. Section 19.2-266.2 of the Code of Virginia requires that certain defense motions and objections be filed, in writing, at least seven days before trial. Germane to the present case, 19.2-266.2 includes motions for "dismissal of a[n]... indictment or any count or charge thereof on the ground that a statute upon which it was based is unconstitutional..."
2. Section 19.2-266.2 continues: "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court **shall**, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230" (emphasis added).

3. The Court of Appeals in *Sims v. Commonwealth*, 28 Va. App. 611 (1998) clarified the application of the bill of particulars portion of § 19.2-266.2. There, the Court noted that constitutional challenges that “relate only to the non-specificity of the indictment” do not trigger the mandatory bill of particulars, but a constitutional challenge to the statute itself does. *Id.* at 619 n3.
4. The undersigned will move this Court in October to dismiss the Count I of the indictment which charges Lee Malvo under the terrorism provision of the capital murder statute, § 18.2-31(13) on the grounds that the statute, § 18.2-31(13), is unconstitutional.
5. In order to prepare and argue that motion, and, in the event it is denied, preserve an adequate record for appeal, the defense must know in more detail what the Commonwealth is alleging to have occurred. To argue that § 18.2-31(13) is unconstitutional as applied, the defense requires knowledge of how the Commonwealth intends to apply it.
6. The need for a bill of particulars is acute in this case. The statute in question has never been construed, interpreted or applied. In the ordinary case the prosecution’s application of the statute is significantly constrained by prior case law. Here, the defense has no such guidance as to what events or acts the prosecution is alleging.
7. “The purpose of a bill of particulars is to state sufficient **facts** regarding the crime to inform an accused in advance of the offense for which he is to be tried.” *Swisher v. Commonwealth*, 256 Va. 471, 480 (1998)(emphasis added).
8. Furthermore, Lee Malvo is entitled to due process of law under the Fifth Amendment of the United States Constitution, and “to be informed of the nature and cause of the accusation” under the Sixth Amendment, both of which have been applied to the Commonwealth of Virginia through the Fourteenth Amendment.
9. Section 18.2-31(13) defines as capital murder “[t]he willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in §§ 18.2-46.4.
10. Section 18.2-46.4 reads:

As used in this article unless the context requires otherwise or it is otherwise provided:

“*Act of terrorism*” means an act of violence as defined in clause (i) of subdivision A of §§ 19.2-297.1 committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct

or activities of the government of the United States, a state or locality through intimidation.

"Base offense" means an act of violence as defined in clause (i) of subdivision A of §§ 19.2-297.1 committed with the intent required to commit an act of terrorism.

"Weapon of terrorism" means any device or material that is designed, intended or used to cause death, bodily injury or serious bodily harm, through the release, dissemination, or impact of (i) poisonous chemicals; (ii) an infectious biological substance; or (iii) release of radiation or radioactivity.

11. The indictment states only that: "On or about the 14th day of October, 2002, in the County of Fairfax, Lee Boyd Malvo, did willfully, deliberately and with premeditation kill and murder Linda Franklin in the commission of an act of terrorism as defined in § 18.2-46.4 of the Code of Virginia. Va. Code § 18.2-31(13)."
12. The plain language of the indictment indicates that the murder of Linda Franklin and the act of terrorism are two distinct allegations. The murder is alleged to have occurred "in the commission of an act of terrorism." The use of the preposition "in" clearly indicates that the alleged "act of terrorism" is a larger allegation within which the murder is alleged to be contained.
13. Similarly, the plain language of § 18.2-31(13) indicates that the murder and the act of terrorism are two separate allegations. One can be convicted of capital murder under section 13 if the murder occurs in the "attempted commission" of an act of terrorism. Clearly, if the murder can be completed while the terrorism is not, the act of terrorism must involve something more than the murder.
14. A bill of particulars that satisfied Lee Malvo's constitutional rights to due process and notice of the nature and cause of the accusation against him, and his statutory right to a bill of particulars to "to assist the defense" in filing a constitutional challenge to the underlying terrorism clause of the capital murder statute would answer the following questions:

With regard to "the willful, deliberate and premeditated killing of Linda Franklin" alleged under § 18.31(13):

A. Who is alleged to have been the "triggerman"?

With regard to the "act of terrorism" alleged in the indictment:

B. What is the act of terrorism? Is it alleged to have been completed within a single action or is it a continuing series of acts that, taken together, comprise the act of terrorism?

- C. For each act that constitutes part of the act of terrorism and for the act of terrorism as a whole, who is alleged to have committed it?
- D. For each act that constitutes part of the act of terrorism and for the act of terrorism as a whole, when is it alleged to have been committed?
- E. For each act that constitutes part of the act of terrorism and for the act of terrorism as a whole, where is it alleged to have been committed?
- F. For each act that constitutes part of the act of terrorism and for the act of terrorism as a whole, what is the “weapon of terrorism” alleged to have been used?

With regard to the intent required under the definition of “act of terrorism” in § 18.2-46.4:

- G. Does the Commonwealth allege that Lee Malvo acted with the intent to “(i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation[;]” or both?

If the Commonwealth alleges that Lee Malvo acted with intent (i) above:

- H. What manner of intimidation or what act of intimidation is alleged to have been intended?
- I. What civilian population is alleged to have been intended to be intimidated?
- J. Who is alleged to have been intended to conduct the acts of intimidation?
- K. Where is alleged to have been the intended location of the intimidation?
- L. When is alleged to have been the time that the intimidation intended to take place?
- M. What “weapon of terrorism” is alleged to have been intended to be used to intimidate.

If the Commonwealth alleges that Lee Malvo acted with intent (ii) above:

- N. What government is it alleged that was intended to be influenced by intimidation?
- O. What is alleged to have been the intended manner of intimidation?
- P. Who is alleged to have been intended to conduct the intimidation?
- Q. When is alleged to have been the intended time and date of the intimidation?
- R. Where is alleged to be the location where the intimidation was intended to be conducted?

WHEREFORE, the accused respectfully requests that this Court order the Commonwealth to file a bill of particulars that answers, with particular facts, the questions detailed above.

Respectfully submitted,

LEE BOYD MALVO

By _____
Co-Counsel

and

By _____
Co-Counsel

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
8001 Braddock Road
Suite 105
Springfield, VA 22151
703-323-1200
703-978-1040 (Fax)
VSB No: 20999

Craig S. Cooley, Esquire
3000 Idlewood Avenue
P. O. Box 7268
Richmond, VA 23221
804-358-2328
804-358-3947(Fax)
VSB No: 16593

CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was hand delivered to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road
Room 123
Fairfax, VA 22030

and the original was forwarded for filing to:

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 29th day of August, 2003.

Co-Counsel

Co-Counsel